89-830

No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

VIRGIL M. MARTIN, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

VIRGIL M. MARTIN, pro se
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November, 21, 1989

QUESTIONS PRESENTED

1. Does a computation by the Commissioner, et al, in which an individual's alleged income for one year is knowingly overstated by more than $60,000.00 constitute a determination pursuant to Title 26 U.S.C. 6212(a)?

2. Does a computation by the Commissioner, et al, in which a specific individual's alleged yearly income is computed from Labor Statistics standing alone and without more, constitute a determination pursuant to Title 26 U.S.C. 6212(a)?

3. Can jurisdiction attach to the Tax Court from a Notice of Deficiency that is not a determination pursuant to Title 26 U.S.C. 6212(a)?

4. Did the lower courts fail to follow stare decisis in the instant case?

LIST OF PARTIES

All parties are listed in the caption.

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COMMISSIONER OF INTERNAL REVENUE, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioner Virgil M. Martin respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceeding on September 22, 1989.

OPINIONS BELOW

The Memorandum Findings of Fact and Opinion of the Tax Court was reported in T. C. Memo 1988-461 filed Sept. 22, 1988; a copy of the Memo. is reprinted in the appendix hereto, p. 1a — 21a, infra.

The decision of the Tax Court was entered Sept. 26, 1988; a copy is reprinted in the appendix hereto, at 22a and 23a, infra.

The decision at the appellant level was entered without written nor published opinion; a copy is reprinted in the appendix hereto. at 24a and 25a, infra.

JURISDICTION

The date of the judgment sought to be reviewed was Sept. 22, 1989. 1/.

No order for rehearing was sought.

The statutory provision believed to confer jurisdiction on this Court to review is 28 U.S.C. §1254(1):

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon petition of any party to any civil or criminal case, before or after rendition of judgment or decree; ****"

STATEMENT OF THE CASE

1/ Time of entry was not shown.

For all except the last fifteen months of the years that were at issue — 1979 through 1983 — in the lower courts the petitioner owned and operated, as sole proprietor, a retail hardware and paint business dba Brevard Hardware and Paint located in Cocoa (Brevard County), Fl.

During the approximate peried of Dec. 1, 1981 through Sept. 30, 1982 petitioner liquidated his stock in trade and equipment and closed the business. Petitioner was out of business and unemployed for the remaining fifteen months — Oct. 1, 1982 through Dec. 31, 1983 — at issue.

In Nov. of 1985 petitioner received a Notice of Deficiency [Letter 531 (DO)(Rev. 8-84)] (hereinafter referred to as NOD) dated Nov. 4, 1985 in which the Commissioner, et al, deliberately and knowingly overstated petitioner's alleged income for 1975 through 1978 by $63,841.61 and further stated that petitioner's income for the

year 1979 was equal to the average of petitioner's income for 1975 through 1978, which he had determined to be $67,685.83, resulting in a deficiency for 1979 of $30,009.97. In the attachments to the NOD was a computation that allegedly produced petitioner's average income for the four year period 1975 through 1978.

The petitioner's income for the years 1975 — 1978 had previously been determined by the Tax Court in Martin v. Commissioner, T. C. Memo 1985-43 filed Jan. 28, 1985 and was, therefore, Res judicata. In Martin, supra. the Tax Court found that petitioner's income for the years 1975 — 1978 was $373.79; 1,471.19; 6,066.44 and 7,465.44 respectively and the average of those four figures is $3,844.22. The Commissioner, et al, unquestionably knew the petitioner's correct income for 1975 through 1978 and, in any event, petitioner pointed out the correct figure when he petitioned

the Tax Court in the instant case.

The respondent, when he computed petitioner's average income for 1975 — 1978, used figures that reflected the gross receipts of Brevard Hardware for each of the years 1975 — 1978, which figures respondent had obtained from the NOD that was collateral to Martin, supra. The respondent deducted $750 from each of the gross receipts figures and then arbitrarily labeled the four resulting figures as petitioner's taxable income for the years 1975 — 1978; respondent then averaged the four figures — $67,842.50; 63,556.14; 68,511.46 and 70,833.20 — producing the figure $67,685.83. Respondent thus inflated petitioner's average 1975 — 1978 income by $67,685.83 (respondent's bogus average) less $3,844.22 (correct average from Martin, supra.) = $63,841.61. It was on the basis of the foregoing bogus average that respondent alleged to have determined that petitioner had a def-

iciency of $30,009.97 for 1979.

Respondent further stated, in the NOD for the instant case, that for 1980 through 1983 petitioner's income was computed by reference to Bureau of Labor Statistics and was accordingly increased by $9,632 for each of those years; this yearly increase was the basis for respondent's alleged determination of deficiencies in the amounts of $1,340; 1,292; 1,048 and 972 for those four years respectively. No proof nor evidence that the petitioner had ever received or expended the alleged $9,632 per year was ever adduced and no source for the alleged amounts was ever identified.

In an Amendment to Answer which respondent filed, by leave of the Court, on June 10, 1987 just twelve days before call of the calendar for trial respondent arbitrarily recalculated the alleged deficiency for the year 1979 on the basis — as he

had, in the NOD, for the years 1980 through 1983 — of Labor Statistics which resulted in a reduction of petitioner's alleged income for 1979 of $55,827.83 and concomitant reduction in alleged deficiency for that year of $27,463.97 thus dropping alleged income for 1979 by over 82% and alleged deficiency by over 91%.

Respondent, also — in his Amendment to Answer — recalculated petitioner's alleged income and alleged deficiency for the years 1980 — 1983 using more current Labor Statistics which — because of inflation — resulted in a slight increase for each of those years. This slight increase, in conjunction with the massive decrease for 1979, resulted in a decrease of total alleged income for the five years at issue of over 40% and a decrease of total alleged deficiency for the five years of over 74%.

The Tax Court, having previously honored the figures in the NOD with presumption

of correctness and having taken jurisdiction on the basis of the NOD, now also honored the figures in respondent's Amendment to Answer with presumption of correctness, and conducted the trial and founded it's decision upon the new figures.

Petitioner requested, inter alia, — in his petition — that the Tax Court overturn the NOD on grounds that it was grossly erroneous upon its face; but the Tax Court never made any specific reply to that request and so tacitly denied it.

Petitioner filed a number of motions during pre-trial and trial in the Tax Court. Petitioner filed, inter alia, a motion to quash the NOD and a motion to shift burden of proof to Commissicner prior to respondent's Amendment to Answer and petitioner renewed both these motions after respondent's Amendment to Answer. All petitioner's motions were denied.

Petitioner, at trial, introduced nine-

teen exhibits, consisting of correspondence with the respondent during the discovery phase, into evidence. One of these exhibits — which came from respondent's own files — proved that petitioner had made no income from his hardware business for 1980, 81, and 82; this same exhibit supported petitioner's testimony, given under oath, that he went out of business on Sept. 30, 1982 and was thereafter unemployed and respondent did not contest nor dispute that testimony. In another of the exhibits — respondent's response to petitioner's request for admissions — respondent admitted that petitioner's income for the years 1975 through 1978 was Res judicata pursuant to Martin, supra. and therefore could not have averaged $67,685.83.

Petitioner, at trial, objected to introduction of Labor Statistics into the record on grounds that the statistics do not reflect income and are not evidence relative

to the petitioner. Petitioner's objection was overruled.

Petitioner invoked jurisdiction and venue of the Eleventh Circuit to review the Tax Court decision under 26 U.S.C. sec. 7482(a) and 7482(b) by filing Notice of Appeal on Dec. 22, 1988 pursuant to 26 U. S.C. sec. 7483.

There is nothing in the proceedings below that cites a specific statute from which Tax Court (court of first instance) jurisdiction attached. Petitioner believes that the Tax Court founded it's jurisdiction upon 26 U.S.C. sec. 6212. Title 26 U. S.C. sec. 7442 and the Tax Court's Rule 13 also set forth conditional jurisdiction.

REASONS FOR GRANTING THE WRIT

Petitioner recognizes that this is a very busy court but this case merits this court's attention and the time expended to exercise it's authority to guide, discipline and supervise the courts below will

not be wasted.

The Congress could not possibly have intended to give the Secretary, et al, the power to send out deficiency notices that merely pay lip service to form and which contain deliberately falsified computations and allegations. The Congress must have intended for the word "determines" in 26 U. S. C. sec. 6212(a) to operate as a constraint or the word would not have been used. Computations and allegations that are deliberately and knowingly false surely can not be characterized as determinations and therefore do not authorize the Secretary, et al, to send out a deficiency notice. The Commissioner, et al, openly admitted that the NOD in this case contained deliberately false computations and allegations when he arbitrarily reduced petitioner's alleged income for 1979 by over 82% (see page 7).

The Commissioner, in this case, did not confine himself to the requirements of 26

U.S.C. 6212(a), but knowingly made a mockery of it by initiating a procedure that he unquestionably knew was outside of the law. The Tax Court made itself a party to the Commissioner's procedure by honoring a NOD that was clearly falsified and grossly erroneous, with presumption of correctness and by assuming jurisdiction upon the basis of such a NOD. The Eleventh Circuit Court of Appeals condoned this procedure by failing to exercise it's authority to correct it.

History demonstrates that the respondent will not hesitate to repeatedly use all his powers — including those acquired by court condonation — and if the procedure used in in this case stands uncorrected it will surely be to the detriment of millions of U.S. citizens.

The Eleventh Circuit did not see fit to express an opinion in this case, but simply stated ambigously that the Tax Court's decision was affirmed because petitioner's

appeal was frivolous. An examination, by this Court, of the documentation in this case will show that the petitioner's appeal was not frivolous.

It is impossible to draw specific contrasts to non-existant Eleventh Circuit opinions and opinions in other cases — including some by this Court — but the following will show that the Eleventh Circuit erred in affirming:

I.

THE COMMISSIONER'S, ET AL, COMPUTATION RELEVANT TO THE YEAR 1979 WAS NOT A DETERMINATION PURSUANT TO TITLE 26 U.S.C. 6212(a)

The Tax Court, in honoring and basing it's decision upon respondent's Amendment to Answer, tacitly admitted that the NOD was grossly inflated and therefore not a determination for surely both the NOD and the Amendment to Answer can not be presumed correct.

This Court found in Helvering v. Taylor,

293 U.S. 507, 515, 79 L. Ed. 623, 55 S Ct 287 (1935) that the Board should have held the determination invalid on the basis of facts shown by the taxpayer. The petitioner, in his petition to the Tax Court, presented incontrovertible facts showing that the NOD in this case was excessive and without rational foundation and petitioner cited Helvering, supra. in support of his contention that the NOD should be overturned. Helvering, supra. supports petitioner's contention that the NOD in the instant case is not a determination. See also United States v. Janis, 428 U.S. 433, 441, 96 S. Ct. 3021, 3026, 49 L. Ed.2d 1046 (1976) where this Court said a naked assessment may be without rational foundation and excessive. A NOD that is without rational foundation is not a determination.

Following are five quotations from Scar v. CIR, 814 F.2d 1363 (9th Cir. 1987):

'"*** Congress did not grant the Secretary unlimitted and unfettered authority to issue notices of deficiency."' (at [6], p. 1368).

'" By its very definition and etymology the word 'determination' irresistibly connotes consideration, resolution, conclusion and judgment."' supra.

"The Commissioner's and the dissent's contention that the issuance of a formally proper notice of deficiency of itself establishes that the Commissioner has determined a deficiency must be rejected." (at [8, 9], p. 1370).

"It is quite clear, however, that the notice did not contain the amount of deficiency, but rather contained an amount unrelated to any deficiency for which the Scars were responsible." (at [8, 9] — F. N. 11, p. 1370).

"Because the Commissioner's purported notice of deficiency revealed on its face that no determination of tax deficiency had been made in respect to the Scars for the 1978 tax year, it did not meet the requirements of section 6212(a)." (at [11], P. 1370).

All the above quotes are cogently apposite to the instant case and show that under Scar, supra. no determination pursuant to Title 26 U.S.C. 6212(a) was made in the instant case.

A COMPUTATION, BASED ON LABOR STATISTICS STANDING ALONE AND WITHOUT MORE, BY THE COMMISSIONER, ET AL, IS NOT A DETERMINATION

From the NOD in the instant case:

> "In the absence of adequate records for 1980 through 1983 your income is computed by reference to Bureau of Labor Statistics. Accordingly, your income is increased $9,632.000 (sic) for 1980, 1981, 1982 and 1983."

Nowhere did the respondent identify any source, nor offer any proof that the petitioner ever received the alleged $9,632 per year; the respondent relied solely upon Labor Statistics to make his alleged computation and made no claim that the petitioner had realized the alleged amounts from his hardware business. A reading of Labor Statistics will make it a priori obvious that they do not reflect income nor relate to any specific individual and therefore are not, standing alone, evidence nor proof of income derived by any specific individual.

The Ninth Circuit in Scar, supra. (at [7]. p. 1368) found that:

> '**** (T)he Commissioner must consider information that relates to a particular taxpayer before it can be said that the Commissioner has "determined" a "deficiency" in respect to that taxpayer.'

The NOD, in the instant case, contained absolutely no information related specifically to the petitioner upon which respondent could have bottomed his allegation that the petitioner derived $9,632 for each of the years 1980 through 1983. Scar, supra. supports petitioners contention that Labor Statistics, standing alone, can not be used to determine income.

Martin, supra. demonstrates that the petitioner was realizing little or no profit from his hardware business and petitioner introduced an exhibit at trial that showed that he had realized no profit from the business for 1980, 81 and 82 and was out of business for all of 1983.

Following are quotes from Gerardo v. CIR, 552 F.2d 549 (3rd. Cir. 1977):

> '"(T)he absence of adequate tax records [as is the case here] does not give the Commissioner carte blanche for imposing Draconian absolutes."' (at [6], p. 553).
>
> "We are obliged to conclude therefore that, absent proof in the record that Gerardo was involved in gambling activities from April 4, 1966 through August 5, 1966, no court could properly draw an inference of such involvement." (at [6], p. 554).
>
> "Without that evidentiary foundation, minimal though it may be, an assessment may not be supported even where the taxpayer is silent." supra.
>
> "*** (W)e nevertheless must insist that the Commissioner provide some predicate evidence connecting the taxpayer to the charged activity if affect is to be given his presumption of correctness." supra.

See also Carson v. United States, 560 F.2d 693 (5th Cir. 1977).

Respondent, in the instant case, never pointed to any activity that petitioner was engaged in that could have produced the alleged $9,632 per year for 1980

through 1983.

In view of the foregoing, respondent's allegations in the NOD regarding the years 1980 through 1983 was not a determination pursuant to Title 26 U.S.C. 6212(a).

III.

JURISDICTION CAN NOT ATTACH TO THE TAX COURT FROM A NOTICE OF DEFICIENCY THAT IS NOT A DETERMINATION PURSUANT TO TITLE 26 U.S.C. SEC. 6212(a).

Under Helvering, supra. and Janis, supra. the Tax Court should have set aside the NOD in the instant case. Petitioner cited both the foregoing cases in his petition to the Tax Court in support of his request that the Tax Court overturn the NOD. Petitioner contends that an assumption of jurisdiction where such assumption could not have occured had stare decisis been honored, is invalid.

The Ninth Circuit said in Scar, supra.:

> '"A valid petition is the basis of the Tax Court's jurisdiction. To be valid, a petition must be filed from a

valid statutory notice."' (at [1], p. 1366 and quoted from Stamm International Corp. v. Commissioner, 84 T.C. 248, 252 [1985]).

"Failure to comply with statutory requirements renders the deficiency notice null and void and leaves nothing on which Tax Court jurisdiction can rest." (at [10], p. 1370).

The respondent, in the instant case, issued the deficiency notice in deliberate, and apparently contemptuous, disregard for the law as laid down in Title 26 U.S.C. 6212(a); the deficiency notice met the requirements of form only and contained no substantial fact to support the alleged deficiency amounts. The deficiency notice was issued outside the law and was therefore invalid and jurisdiction can not attach to the Tax Court from such a notice. No act by the parties to a dispute can cure an absence of jurisdiction.

IV.

THE LOWER COURTS FAILED TO FOLLOW STARE DECISIS

The petitioner — in support of the same general points and arguments — cited all the cases cited herein (except Stamm International Corp., supra.) in the courts below. In addition to the cases cited herein, petitioner cited Cohen v. CIR, 266 F. 2d 5 (9th Cir. 1959); Herbert v. CIR, 377 F.2d 65 (9th Cir. 1967) and Baird v. CIR, 438 F.2d 490 (3rd Cir. 1971) in support of two motions to quash the NOD and two motions to shift burden of proof to the Commissioner.

THe lower courts, in denying the petition, all motions and petitioner's appeal tacitly disregarded all the cases the petitioner cited.

Petitioner believes that all the cases he cited in the lower courts were valid and apropos for the purpose cited.

In view of the foregoing the lower courts failed to follow stare decisis.

CONCLUSION

The petitioner, being a laymen, may have made some mistakes in documentation below, but — if so — they were honest mistakes and therefore not frivolous. A calling up, and examination of the records in this case will show that the petitioner made every possible effort to follow rules and that none of his actions were taken frivolously.

For these reasons, this petition for certiorari should be granted.

Respectfully submitted,

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(407) 783-2204

Date: Nov. 21, 1989

APPENDIX

T. C. Memo. 1988-461

UNITED STATES TAX COURT

VIRGIL M. MARTIN, Petitioner v.
COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 2842-86 Filed Sept. 22, 1988.

Virgil M. Martin, pro se.

Mike Jorgensen, for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

WELLS, Judge: Respondent determined deficiencies in and additions to petitioner's Federal income tax as follows (all section references are to the Internal Revenue Code of 1954, as amended and in effect during the years in issue, and all Rule references are to the Tax Court Rules of Practice and Procedure):

SERVED SEP 22,1988

Year	Deficiency	Additions To Tax Under Sections 6653(b)	6653(b)(1)	6653(b)(2)	6654
1979	$30,009.97	$15,004.99	$-0-	-0-	$1,250.06
1980	1,340.00	670.00	-0-	-0-	85.56
1981	1,292.00	646.00	-0-	-0-	99.26
1982	1,048.00	-0-	524.00	*	102.22
1983	972.00	-0-	486.00	**	59.48

* 50 percent of the interest due on $1,048.00
** 50 percent of the interest due on $972.00

By answer, respondent asserted additions to tax under sections 6651(a)(1), 6653(a), 6653(a)(1), 6653(a)(2) and 6654 as follows:

Year	Additions to Tax Under Sections 6651(a)(1)	6653(a)	6653(a)(1)	6653(a)(2)	6654
1979	$7,502.49	$1, 500.50	$-0-	-0-	$1,250.06
1980	335.00	67.00	-0-	-0-	85.56
1981	161.50	64.60	-0-	-0-	99.26
1982	262.00	-0-	52.40	*	102.22
1983	243.00	-0-	48.60	**	59.48

* 50 percent of interest due on $1,048.00
** 50 percent of interest due on $972.00

By amendment to answer filed 12 days prior to call of the instant case from the calendar, respondent asserted a decrease in the deficiency for taxable year 1979 in the amount of $27,463.97 and increases in the deficiencies for the remaining taxable years in issue as follows:

Year	Increase in Deficiency
1980	$210
1981	218
1982	585
1983	499

As a result of the amendment to respondent's answer, the deficiencies and additions to petitioner's Federal income taxes sought by respondent are as follows:

Year	Deficiency	Additions to Tax Under Section 6651(a)(1)	6653(a)	6653(a)(1)	6653(a)(2)	6654
1979	$2,546	$636.50	$127.30	$-0-	$-0-	$106.40
1980	1,550	387.50	77.50	-0-	-0-	98.96
1981	1,510	377.50	-0-	75.50	*	115.71
1982	1,633	408.25	-0-	81.65	**	158.93
1983	1,471	367.75	-0-	73.55	***	90.13

* 50 percent of the interest due on $1,510.
** 50 percent of the interest due on $1,633.
*** 50 percent of the interest due on $1,471.

Respondent's answer, amended answer, and brief fail to assert any additions to tax under section 6653(b), and we take that as a concession as to all additions to tax under section 6653(b). At the start of trial, respondent orally moved for the imposition of damages under section 6673.

The issues for decision are as follows: (1) whether petitioner received unreported income and, if so, the amount thereof; (2) whether petitioner is liable for additions to tax; and (3) whether petitioner is liable for damages under section 6673. For convenience, our findings of fact and opinion are combined.

Certain of the facts have been stipulated and are so found. The stipulation of facts and exhibits thereto are incorporated herein by reference. At the time the petition in this case was filed, petitioner was a resident of Cocoa Beach, Florida. From 1979 through 1981 and during part of 1982,

petitioner, as sole proprietor, operated a hardware business under the name of "Brevard Hardware and Paint." located in Cocoa Beach, Florida.

For taxable year 1979, petitioner filed a protest-type document purporting to be a return. The document contained no information from which petitioner's Federal income tax liability could be determined. Petitioner filed no returns for taxable years 1980 through 1983. Attached to his purported return for year 1979 were typical protest-type statements asserting Fifth Amendment rights. During the same period, however, petitioner filed sales and use tax reports with the Department of Revenue for the State of Florida.

Petitioner's books and records were requested during his audit, but he consistently refused to disclose any facts or to make his books and records available.

The parties stipulated that petitioner

is the same Virgil M. Martin who was a party in Martin v. Commissioner, T.C. Memo. 1985-43, affd. 803 F.2d 1184 (11th Cir. 1986), a case that involved petitioner's taxable years 1975 through 1978 (hereinafter "petitioner's prior case"). Based on information contained in the notice of deficiency at issue in petitioner's prior case, respondent determined in his notice of deficiency in the instant case that petitioner's income from the operation of Brevard Hardware and Paint for taxable year 1979 should be increased by $67,658.83. Relying upon statistics from the U.S. Bureau of Labor Statistics (the "Labor statistics"), respondent determined that petitioner's income for each of the taxable years 1980 through 1983 should be increased by $9,632. Respondent also determined that petitioner's income should be increased for dividends received in taxable years 1980, 1981, 1982 and 1983, in the amounts of $1,085, $1,192, $507, and

$592, respectively, and for interest received in taxable year 1980 in the amount of $156.

In his amended answer, respondent conceded the issue of interest income and also recalculated petitioner's income for taxable years 1979 through 1983. In those recalculations, respondent relied upon more current Labor statistics. Respondent deducted the previously asserted dividend income from the living expense statistics used to compute petitioner's income. The recalculations in the amended answer reduced the deficiency determined by respondent for taxable year 1979 and increased the deficiencies for taxable years 1980 through 1983.

Since filing his petition with this Court, as well as throughout the pre-trial phase and the trial itself, petitioner has continued his "protestor" attitude in his dealings with this Court and with respond-

dent's counsel. Almost all of petitioner's arguments have been frivolous and have served no purpose except to waste our time and resources and those of respondent and his counsel. Petitioner's numerous motions, all without merit, contributed to that result.

Petitioner has neither produced any books or records, nor satisfactorily explained their absence. Thus, although he has complained that the statutory notice was arbitrary, petitioner has declined to furnish respondent with sufficient information to determine petitioner's tax liability.

The first issue for decision is whether petitioner had unreported taxable income as determined by respondent.

When a taxpayer fails to maintain adequate books and records, respondent is entitled to reconstruct the taxpayer's income by any reasonable method. Holland v. United

States, 348 U.S. 121 (1954); Mallette Bros. Construction Co. v. United States, 695 F.2d 145, 148 (5th Cir. 1983); Cupp v. Commissioner, 65 T.C. 68, 82 (1975), affd. without published opinion 559 F.2d 1207 (3rd. Cir. 1977). The use of Labor statistics in determining taxable income is an acceptable and reasonable method of income reconstruction. Pollard v. Commissioner, 786 F. 2d 1063, 1066 (11th Cir. 1986), affg. T.C. Memo. 1984-536; Burgo v. Commissioner, 69 T.C. 729, 749 (1978); Culp v. Commissioner, supra; Giddio v. Commissioner, 54 T.C. 1530, 1532 (1970). Such a method has been approved in numerous decisions of this Court. See Wagner v. Commissioner, T.C. Memo. 1987-601, on appeal (10th Cir., Mar. 8, 1988); Markman v. Commissioner, T.C. Memo. 1987-407; Schuck v. Commissioner, T. C. Memo. 1984-159; Varano v. Commissioner, T.C. Memo 1984-135; Denson v. Commissioner, T.C. Memo. 1982-360; Wheeling v. Commiss-

ioner, T.C. Memo. 1982-246, affd. 709 F.2d 1512 (6th Cir. 1983); Kindred v. Commissioner, T.C. Memo. 1979-457, affd. 669 F.2d 400 (6th Cir. 1982); Funk v. Commissioner, T.C. Memo. 1979-426, affd. 672 F.2d 922 (9th Cir. 1982). Petitioner shoulders the burden of proving that the statutory notice is arbitrary, excessive or without foundation. Helvering v. Taylor, 293 U.S. 507 (1935) affg. 70 F.2d 619 (2nd. Cir. 1934), reversing and remanding 27 B.T.A. 1426 (1933); Jackson v. Commissioner, 73 T.C. 394 (1979). However, "The Commissioner's determination is not made arbitrary or unreasonable because of his failure to have all the facts when the failure is caused solely by the petitioner." Roberts v. Commissioner, 62 T. C. 834, 836-837 (1974).

Respondent was forced to use statistics to reconstruct petitioner's income because petitioner did not file returns for the years in issue and did not provide respon-

dent with any information concerning his income or deductions. Under the circumstances involved in the instant case, we do not find respondent's method of reconstructing petitioner's income for the taxable years 1979 through 1983 to be arbitrary, excessive, or without foundation. Thus, to the extent of the deficiencies determined in the notice of deficiency, we find for respondent since petitioner has forwarded no probative evidence to refute those determinations. Rule 142(a).

Because respondent seeks increased deficiencies for taxable years 1980 through 1983, however, we must analyze the effect of respondent's burden of proof with respect to those increases. Respondent has the burden of proving that petitioner is liable for the increases in the deficiencies. Rule 142(a); Achiro v. Commissioner, 77 T.C. 881 (1981).

Petitioner admitted to specific amounts

of expenditures for his mortgage and property taxes. Petitioner also admitted to having living expenses for transportation, utilities, and hobbies and entertainment. Those are three types of expenditures comprising the surveys upon which the Labor statistics are based. We find that the Labor statistics, supplemented by petitioner's admissions, establish a prima facie case that petitioner had income at least equal to those expenses. Cf. United States v. General Dynamics Corp., 415 U.S. 486, 496 (1974); Varano v. Commissioner, T.C. Memo. 1984-135 (statistics used to establish prima facie cases).

When a party establishes a prima facie case, the burden of going forward with the evidence shifts to the other party. Suarez v. Commissioner, 61 T.C. 841, 845 (1974). Petitioner did not offer any evidence to show that his expenditures for living expenses were different from Labor statistics

or that his income was from a non-taxable source. Based upon our observation of petitioner and his demeanor, we do not believe his vague assertion that his living expenses were paid out of accumulated savings. The following is an example of petitioner's testimony explaining his source of funds to pay expenses: "I utilized a portion of my life, which was a gift from my creator, which was non-taxable; I exchanged portions of that gift for funds which I then utilized for various purposes." Petitioner offered no evidence to corroborate his testimony regarding his savings. We find petitioner's self serving, vague testimony unworthy of belief.

Based on the foregoing, we find that respondent has satisfied his burden of proof with respect to the increases in the deficiencies. Accordingly, we hold that petitioner is liable for the increased

deficiencies asserted in respondent's answer for taxable years 1980 through 1983. We also accept respondent's revised determination for taxable year 1979 which reduced the deficiency for that year to $2,546.

We now turn our attention to the additions to tax. In his answer and amended answer, respondent asserted additions to tax under sections 6651(a)(1) and 6653(a). In his amended answer, respondent also asserted increases in the additions to tax under section 6654 consonant with the asserted increased deficiencies. The additions to tax under sections 6651(a)(1) and 6653(a) were first asserted in respondent's answer, and thus are new matters for which respondent has the burden of proof. Rule 142(a); Sanderling, Inc. v. Commissioner, 66 T.C. 743, 757 (1976), affd. on this issue and revd. on other grounds 571 F.2d 174 (3rd. Cir. 1978).

Section 6651(a)(1) imposes an addition

to tax for failure to timely file a tax return, unless it is shown that such failure is due to reasonable cause and not due to willful neglect. Petitioner filed no documents even purporting to be Federal income tax returns for taxable years 1980 through 1983, and the document filed by petitioner for taxable year 1979 is not a return. United States v. Porth, 426 F.2d 519 (10th Cir. 1970), cert. denied 400 U. S. 824 (1970). Petitioner's conduct in this proceeding readily convinces us that his failure to file returns was due to willful neglect and not to any reasonable cause. We therefore hold that petitioner is liable for the additions to tax under section 6651(a)(1).

For taxable years 1979 and 1980, section 6653(a) provides that, if any part of any underpayment of tax is due to negligence or intentional disregard of rules and regulations, there shall be added to the tax

an amount equal to five percent of the underpayment. For taxable years 1981 through 1983, section 6653(a)(1) prescribed substantially the same addition to tax as section 6653(a) for taxable years 1979 and 1980. For taxable years 1981 through 1983, section 6653(a)(2) prescribes an addition to tax equal to 50 percent of the interest payable with respect to the portion of the underpayment attributable to negligence or intentional disregard. Petitioner's repeated failures to file proper tax returns for each of the years in issue cogently convinces us that the underpayments of tax are attributable to intentional disregard of rules and regulations. We therefore hold that petitioner is liable for the additions to tax under section 6653(a) for taxable years 1979 and 1980 and the additions to tax under sections 6653(a)(1) and (a)(2) for taxable years 1981 through 1983.

Section 6654 provides for additions to

tax for the failure to pay estimated income tax. Where payments of tax, through either withholding or quarterly estimated tax payments during the course of the year, do not equal the percentage of total liability specificed by the statute, imposition of the addition to tax under section 6654 is automatic, unless petitioner comes within one of the limited statutory exceptions. Petitioner does not come within any of those exceptions. At trial, petitioner admitted that no taxes were withheld and that he made no estimated payments of income tax during any of the years in issue. Because we hold above that petitioner is liable for the deficiencies at issue, we hold that the additions to tax under section 6654 are proper.

Finally, respondent seeks damages of $5,000 to be awarded to the United States on the ground that the petitioner maintained the proceedings in the instant case

primarily for purposes of delay or that his position was frivolous. Section 6673 provides that damages may be awarded "Whenever it appears to the Tax Court that proceedings before it have been instituted or maintained by the taxpayer for delay [or] that taxpayer's position in such proceeding is frivolous or groundless * * *."

The record in the instant case overwhelmingly establishes that petitioner is a protestor, despite his objections to the use of that term to describe him. Petitioner's attitude convinces us that he is a hard-core protestor who would like nothing better than to "throw great amounts of sand into the gears of the adminstrative process." Dresser Industries, Inc. v. United States, 596 F.2d 1231, 1235 n. 1 (5th Cir. 1979), cert. denied 444 U.S. 1044 (1980).

Petitioner failed to file returns for the years in issue. He refused to cooperate with respondent's agents and refused to

supply those agents with any information. Although petitioner was given ample opportunity to present evidence to refute respondent's determinations, he failed to do so. Instead, throughout the pendency of the proceedings in the instant case, petitioner essentially has done little more than "sit on his fanny and yell." C. E. Wilson, remark at press conference in Detroit, Michigan (Oct. 11, 1954).

Petitioner's course of conduct convinces us that he instituted these proceedings primarily to delay the payment of his taxes. Moreover, his position in this case is frivolous and groundless. Petitioner was forewarned of the possibility that the Court might award damages if he continued in his course of conduct. In petitioner's prior case the United States was awarded damages of $500 and petitioner was expressly warned as follows:

We also warn petitioner that we are

> authorized to impose damages in an amount not in excess of $5,000. Petitioner should bear that fact in mind in connection with any further proceedings which he may institute in this Court.

Respondent advised petitioner that he would seek the imposition of damages if petitioner continued to assert frivolous and groundless positions in the Tax Court. The Court also reiterated that warning prior to the start of the trial. We therefore award damages to the United States pursuant to section 6673 in the amount of $5,000.

To reflect the foregoing,

Decision will be entered for the respondent.

UNITED STATES TAX COURT
Washington, D.C. 20217

VIRGIL M. MARTIN, Petitioner,	)	
V.	)	Docket No. 2842-86
COMMISSIONER OF INTERNAL REVENUE	)	

DECISION

Pursuant to the determination of the Court as set forth in T.C. Memo. 1988-461, filed September 22, 1988, it is

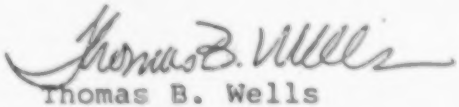
ORDERED and DECIDED that there are deficiencies in and additions to petitioner's Federal income taxes as follows:

Year	Deficiency	6651(a)(1)	Additions to the Tax Under Section 6653(a)	6653(a)(1)	6653(a)(2)	6654
1979	$2,546	$636.50	$127.30	$-0-	$-0-	$106.40
1980	1,550	387.50	77.50	-0-	-0-	98.96
1981	1,510	377.50	-0-	75.50	*	115.71
1982	1,633	408.25	-0-	81.65	**	158.93
1983	1,471	367.75	-0-	73.55	***	90.13

* 50 percent of the interest due on $1,510.
** 50 percent of the interest due on $1,633.
***50 percent of the interest due on $1,471.

It is further -

ORDERED and DECIDED that respondent's oral motion for the imposition of damages under section 6673 is granted and the United States is awarded damages pursuant to section 6673 in the amount of $5,000.



Thomas B. Wells
Judge

Entered: SEP 26 1988

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 89-5016
Non-Argument Calendar

DO NOT PUBLISH

Tax Ct. No. 2842-86

VIRGIL M. MARTIN

Plaintiff-Appellant,

versus

COMMISSIONER OF INTERNAL REVENUE

Defendant-Appellee.

Appeal from a Decision of the
United States Tax Court

(September 22, 1989)

Before FAY, KRAVTICH, and ANDERSON, Circuit Judges.

PER CURIAM